

15. Iowa	Vol. 55 §728.4 (1979); Vol. 57(A)- §903.1 (1979)	Mis.	\$100
16. Kansas	§21-4301	Class A Mis.	Not more than \$2,500, or double pecuniary gain
17. Kentucky	§531.020 (1975)	Class Mis. if more than one article	Corp. Fine \$10,000
18. Louisiana	Vol. 9A §14.106(G) (1983)	Not Specified	Between \$1,000 and \$2,500
19. Maine	17 §2911 17A §1301(3)(E)	Class D Crime	Corp. Fine \$10,000 \$5,000
20. Maryland	27 §424 (1982)	Not Specified	1st Offense \$1,000
21. Massachusetts	272-§29 (1983)	Not Specified	Between \$1,000 and \$10,000
22. Michigan	§750.343(a)	Mis.	\$1,000
23. Minnesota	§617.241 (1983)	Mis.	1st Offense , \$5,000
24. Mississippi	§97-29-37 (1972)	Mis.	\$500

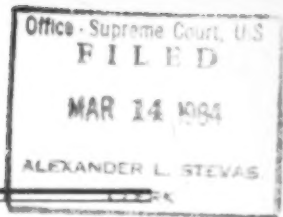
25. Missouri	41A §563.280 (1979)	Mis.	Between \$500 and \$1,000
26. Montana	§94-8-110(4) (1973)	Mis.	Between \$500 and \$1,000
27. Nebraska	§28-813 (1979) §28-106 (1979)	Class I Mis.	\$1,000
28. Nevada	§201-249 (1979) §193-120 (1979)	Mis.	\$1,000
29. New Hampshire	§650:2 (1981) 6 §25:9 (1974)	Mis.	Corp. fine between \$50 and \$200
30. New Jersey	§2C:34-2(b) (1982) §2C:43-3(c) (1982)	Disorderly person (not crime)	 \$1,000
31. New Mexico	Provision only for Sale to Minors		
32. New York	§235.05 §80.10(b)	Class A Mis. (2nd degree)	Corp. fine Class A Mis. \$5,000

33. North Carolina	§14-190.1	Mis.	Fine within discretion of courts
34. North Dakota	§21.1-27.1-01 (1976) §12.1-32-01.1 (1976)	Class A Mis.	Corp. fine \$15,000
35. Ohio	§2907.32 (1982) §2929.31 (1982)	1st degree Mis.	Corp. fine \$5,000
36. Oklahoma	39 §1021 (1982)	Felony	Between \$100 and \$10,000
37. Oregon	§167.087 (1980) §161.635(a) (1980)	Class A Mis.	\$1,000
38. Pennsylvania	18§5903(h) 18§1101 (1983)	1st degree Mis.	\$10,000
39. Rhode Island	§11-31-1	Mis.	\$100 to \$1,000
40. South Carolina	§16-15-320 (1982)	Mis.	1st Offense \$1,000
41. South Dakota	§22-24-25 to §22-24-37	*	\$1,000

* Obscenity distribution to adults not prohibited; offense to display obscene covers in public place.

42. Tennessee	§39-6-1104	Mis.	1st offense - individual 60 days; corp. or other entity \$10,000 - \$50,000
43. Texas	Penal §43.23 (1982) Penal §1.01 (1974)	Felony of 3rd Degree	\$5,000
44. Utah	§76-10-1204 (1978) §76-3-302(2)	Class A Mis.	\$5,000
45. Vermont	13§2807 (1982)	Mis.	\$1,000
46. Virginia	§18.2-374	Class I Mis.	\$1,000
47. Washington	§9.68.140 (1983)	Felony	Between \$5,000 and \$50,000
48. West Virginia	§8-12-5(b)	Allows Municipal Ord. Mis.	\$500
49. Wisconsin	§134-46 (1982)	Mis.	\$1,000
50. Wyoming	§6-4-302 (1983)	Mis.	\$1,000

No. 83-1116



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

LUCY M. HUNT AND GUESS WHAT, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

GORDON W. SMITH,
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2217
Counsel for Respondent

OF COUNSEL:

WILLIAM M. LEECH, JR.
Attorney General
State of Tennessee

TABLE OF CONTENTS

	Page
Table of Authorities	i
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement Of The Case	2
Reasons For Denying The Writ	5
Conclusion	9

TABLE OF AUTHORITIES

Cases

State v. Davis, 654 S.W.2d 688 (Tenn. Crim. App. 1983)	8
State v. Hunt, 660 S.W.2d 513 (Tenn. Crim. App. 1983)	8
McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)	7
Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)	7
Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)	7
Solem v. Helm, ____ U.S. ____, 103 S.Ct. 3001 (1983) ...	5,6
United States v. Danley, 523 F.2d 369 (9th Cir. 1975), <i>cert. denied</i> , 424 U.S. 929 (1976)	6

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)	7,8
---	------------

Other Authorities

North Dakota Cent. Code §§ 21.1-27.1-01	6
Supreme Court Rule 17.1(c)	5
Tennessee Code Annotated § 39-6-1104	2,8
Tennessee Code Annotated § 39-6-1117	2,6,7
Washington Rev. Code § 9.68.140 (1983)	6

No. 83-1116

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

LUCY M. HUNT AND GUESS WHAT, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals of Tennessee

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

The respondent respectfully submits that the petition for a writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals in the instant case is published and appears at 660 S.W.2d 513. The per curiam opinion of the Tennessee Supreme Court denying the petitioners' application for permission to appeal is unpublished and appears in the appendix to petitioners' petition for writ of certiorari to this Court.

JURISDICTION

Jurisdiction to this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Petitioners essentially present the following questions for review.

1. Whether the corporate petitioners' fine of \$15,000.00 on a misdemeanor charge of obscenity and the statutory requirement of a minimum fine of \$10,000.00 constitute excessive fines under the Eighth Amendment to the United States Constitution.

2. Whether the exemption of certain persons from prosecution under Tennessee Code Annotated, Section 39-6-1117, is arbitrary and overbroad in violation of equal protection and due process under the Fourteenth Amendment to the United States Constitution.

3. Whether Tennessee Code Annotated, Section 39-6-1104, classifying punishment for violators of the obscenity law, is vague, indefinite, arbitrary and without rational basis in violation of equal protection and due process under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Fourteenth Amendment to the United States Constitution:

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

At the September, 1981, Term, the Shelby County Grand Jury returned three indictments: No. B-82306, containing eight counts; No. B-82307, containing twelve counts; and No.

B-82316, containing four counts. Petitioner Lucy M. Hunt was charged in No. B-82306, count 1, with knowingly distributing obscene matter, a film entitled "Virgin Ass", and in count 5 with knowingly distributing obscene matter, an untitled film. Petitioner Hunt was charged in No. B-82307, count 1, with knowingly distributing obscene matter, a film entitled "Breakfast in Bed"; in count 5 with knowingly distributing obscene matter, a film entitled "Orange Blossom Summer"; and in count 9 with knowingly distributing obscene matter, a magazine entitled "Shaved Dolls." Petitioner Hunt was charged in No. B-82316, count 1, with knowingly distributing obscene matter, a magazine entitled "No. 1 Prive."

Petitioner Guess What, Inc., was charged in No. B-82306, count 4, with knowingly possessing with intent to distribute obscene matter, the film entitled "Virgin Ass", and in count 8 with knowingly possessing obscene matter, an untitled film. Petitioner Guess What, Inc., was charged in No. B-82307, count 4, with possessing with intent to distribute obscene matter, a film entitled "Breakfast in Bed"; in count 8 with knowingly possessing with intent to distribute obscene matter, a film entitled "Orange Blossom Summer"; and in count 12 with knowingly possessing with intent to distribute obscene matter, a magazine entitled "Shaved Dolls." Petitioner Guess What, Inc., was charged in No. B-82316 with knowingly possessing with intent to distribute obscene matter, a magazine entitled "No. 1 Prive."

Petitioners' trial commenced on March 5, 1982, following pleas of not guilty. On March 15, 1982, the jury found petitioner Hunt guilty in counts 1 and 5 of No. B-82306, guilty in count 5 of No. B-82307, and guilty in count 1 of No. B-82316. The jury fixed punishment at sixty days' confinement in the county jail on each count. The jury found petitioner Guess What, Inc., guilty in counts 4 and 8 of No. B-82306, guilty in count 8 of No. B-82307, and guilty in count 4 of No. B-82316. The jury imposed fines of \$15,000.00 on each count.

The petitioners filed a motion for a new trial on April 8, 1982, which motion was denied on May 7, 1982. The trial court ordered that the jury verdicts on counts 1 and 5 of No. B-82306 be merged as to petitioner Hunt and that the verdicts on counts 4 and 8 of No. B-82306 be merged as to petitioner Guess What, Inc. Petitioner Hunt's sentences were ordered to be served concurrently. Thus, petitioner Hunt was ordered to serve three sixty-day concurrent sentences for knowingly distributing obscene matter. Petitioner Guess What, Inc., was ordered to pay three fines of \$15,000.00 for a total of \$45,000.00, for knowingly possessing with intent to distribute obscene matter.

The petitioners appealed their convictions to the Tennessee Court of Criminal Appeals. On July 14, 1983, the Court affirmed the judgment of the trial court. A petition to rehear was denied on August 8, 1983. A supplemental petition to rehear was denied on August 18, 1983. Permission to appeal was denied by the Tennessee Supreme Court on November 7, 1983.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the instant petition should be denied since the judgment of the Tennessee Court of Criminal Appeals does not involve any federal question of substance not heretofore determined by this Court or not decided in accord with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

A

In the first question presented to the Court, petitioner Guess What, Inc., contends that a fine of \$15,000.00 on a misdemeanor charge of obscenity and the statutory requirement of a minimum fine of \$10,000.00 is excessive in violation of the Eighth Amendment to the United States Constitution. The petitioner relies upon *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001 (1983).

In *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001 (1983), this Court held that the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crimes committed. 103 S.Ct. at 3006. The Court recognized "parallel limitations" on bail, fines, and other punishments. 103 S.Ct. at 3009. In measuring disproportionality, a court must consider (1) the gravity of the offense as compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. 103 S.Ct. at 3010-3011.

Applying these criteria to the instant case, it is clear that the fines imposed¹ upon the petitioner, Guess What, Inc., are not so

¹ The *Solem* case furnishes no basis for a facial constitutional challenge of a statutory punishment under the Eighth Amendment. The Court did not hold the South Dakota recidivist statutes unconstitutional *per se*, but only as they were applied to Helm. Thus, petitioner's additional contention that the statutory minimum fine of \$10,000.00 is *per se* excessive cannot be sustained.

disproportionate as to be excessive. First, while the offense of knowingly possessing obscene matter with intent to distribute is not a violent crime, the fines of \$15,000.00 are far less stringent than the penalty suffered by Helm. As the Court noted in *Solem*, Helm's sentence was the most severe punishment that the State could have imposed on any criminal for any crime. 103 S.Ct. at 3013.

Second, comparing the fines imposed on other criminals in Tennessee does not show that the fines in the instant case are disproportionate. It cannot be said that more serious crimes in Tennessee are subject to the same penalty or to less serious penalties.

Finally, comparing the fines imposed for the commission of the same crime in other jurisdictions does not demonstrate disproportionality. The states of Washington, Wash. Rev. Code § 9.68.140 (1983), North Dakota, N.D. Cent. Code §§ 21.1-27.1-01, 12.1-32-01.1, impose fines comparable to those imposed in Tennessee. It should be noted that a fine of \$15,000.00 under the federal obscenity statute was held not excessive under the Eighth Amendment. *United States v. Danley*, 523 F.2d 369, 370-371 (9th Cir. 1975), *cert. denied*, 424 U.S. 929 (1976).

The respondent submits that the fines imposed upon the petitioner are not disproportionate so as to be excessive under the Eighth Amendment. Accordingly, the petitioners' contention does not merit the granting of certiorari.

B

In the second question presented to this Court, the petitioners contend that Tenn. Code Ann. § 39-6-1117, providing exemption of certain persons and institutions from the coverage of obscenity laws, is overbroad, arbitrary, and without rational basis in violation of due process and equal protection.

In *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), this Court reaffirmed the established view that under the Fourteenth Amendment of the United States Constitution the states are endowed with a wide scope of discretion in the enactment of laws which affect certain groups of citizens differently than others. However, such classifications must be based on grounds reasonably related to the achievement of a legitimate state objective. The exemptions provided for in Tenn. Code Ann. § 39-6-1117 serve the purpose of allowing materials which might be classified as obscene to be used for legitimate educational, scientific, or artistic purposes without fear of prosecution. The goal of ridding society of obscene materials totally lacking any serious literary, artistic, political, or scientific value is a legitimate one. The exemption is not arbitrary and is equally applicable to all persons or institutions in the exempted class.

Nor is the statute overbroad. Those within the exempted class are treated equally and it is a valid exercise of the police power of the State to grant certain exemptions from the operation of general laws. Likewise, there is no improper classification of those individuals who are exempt. The exempt class bears a rational relationship towards a legitimate government interest of protecting activity which may be obscene in certain specific instances.

Although the term "any recognized and established", as applied to the various institutions, is not absolutely precise, "lack of precision is not itself offensive to the requirement of due process". *Roth v. United States*, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957). So long as the petitioners were given adequate warnings as to what conduct was proscribed, they cannot complain of a due process violation. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). One "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others". *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The petitioners' allegation on this issue does not merit the granting of certiorari.

C

In the final question presented to this Court, the petitioners contend that Tenn. Code Ann. § 39-6-1104, classifying punishment for violators of the obscenity laws, is vague, indefinite, and arbitrary and without rational basis in violation of equal protection and due process.

The respondent submits that this statute has a rational relationship to a legitimate government interest and is not arbitrary. The Tennessee Legislature has chosen to single out those offenders who deal more heavily in obscene material and subject them to more severe punishment. Under the statute, the breakpoint between Class A and Class B violators is 25% of the stock in trade, inventory, and sales of the violator during any given twenty-four hour period. The 25% figure is not an arbitrary amount in that it will ensure that the offenders who deal primarily in obscene materials will be subjected to more severe punishment than those who do so only as a small incidental portion of their business.

Furthermore, the punishment section of Tenn. Code Ann. § 39-6-1104(e) and (f) does not unconstitutionally distinguish between those who sell obscene printed matter and those who sell obscene movies. The Tennessee courts have held that this section must be read *in pari materia* with Tenn. Code Ann. § 39-6-1101(4) which defines obscene "matter" to include motion picture films; as so read, the statute does not distinguish between printed matter and movies. *State v. Hunt*, 660 S.W.2d 513, 519 (Tenn. Crim. App. 1983); *State v. Davis*, 654 S.W.2d 688, 693 (Tenn. Crim. App. 1983). The petitioners' allegation on this issue does not merit the granting of certiorari.

CONCLUSION

For the reasons stated herein, respondent respectfully submits that, in affirming petitioners' convictions, the Tennessee Court of Criminal Appeals did not decide a federal question of substance not heretofore determined by this Court nor did it decide any such question in a way probably not in accord with applicable decisions of this Court. There are no special or important reasons for granting certiorari in this cause, and accordingly, the instant petition should be denied.

Respectfully submitted,

GORDON W. SMITH

Assistant Attorney General

450 James Robertson Parkway

Nashville, Tennessee 37219

(615) 741-2217

Counsel for Respondent

OF COUNSEL:

WILLIAM M. LEECH, JR.

Attorney General

State of Tennessee